MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 50 CENTS PER NUMBER

NOTE AND COMMENT

FREEDOM OF PRESS AND USE OF THE MAILS.—Strangely enough, the First Amendment to the Federal Constitution, although it guarantees against federal attack highly important and fundamental rights, has received very little authoritative interpretation by our courts. It remained for the Great War and conditions following in its train to bring before that tribunal almost the first really important controversies relating to freedom of press and of speech. The case of *U. S. ex rel. Milwaukee Social Democratic Publishing Company, Plaintiff in Error,* v. *Postmaster-General Albert S. Burleson,* decided March 7, 1921, is the latest of a series of notable cases concerning this important matter. The case, however, adds little to the development of the subject by the court in the preceding cases in this group, which have been reviewed in an article by Professor Goodrich, 19 MICHIGAN LAW REVIEW, pages 487-501.

In the group of recent cases referred to, a divergence of opinion among the judges themselves had appeared. In *Schenck* v. *U. S.,* 249 U. S. 47, 39 Sup. Ct. Rep. 247, in the unanimous opinion written by Mr. Justice Holmes, the test of liability for speech was expressed as follows:

"The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress had a right to prevent."

This would seem to be a definite rejection of "the tendency" or "indirect causation" tests and the court adhered to this view in two cases decided shortly thereafter. *Frohwerk* v. *U. S.*, 249 U. S. 204, 39 Sup. St. Rep. 249; and *Debs* v. *U. S.*, 249 U. S. 211, 39 Sup. Ct Rep. 252. The *Debs* case, particularly, has been criticized on the ground that it did not apply the test as stated above to the facts in the case. (See references in Professor Goodrich's article above referred to, 19 MICH. L. REV. 487, 492. See also the book of Professor Z. Chafee, Jr., "FREEDOM OF SPEECH," 90-93.) Other cases in which the court appeared to adhere to its statement of the test in the *Schenck* case are referred to, 18 MICH. L. REV. 490, n. 12. But on March 8, 1920, the court announced the decision in *Pierce* v. *U. S.*, 252 U. S. 239, 40 Sup. Ct. Rep. 205, in which as pointed out by Professor Goodrich in the article before referred to, Justice Pitney, writing the opinion for the court, declares the doctrines known as "indirect causation" and "constructive intent" as the basis of liability. It will be seen from this brief review of the cases that the court is divided in opinion and that it cannot be said with confidence that any test of liability has been definitely and permanently adopted by the court.

In the case decided March 7th, 1921, freedom of the press is discussed especially by Justice Brandeis, in a vigorous and able dissenting opinion, but the case has brought the court no nearer to a final position as to what is the "freedom of press" guaranteed by the First Amendment. A majority of the court sustain the Postmaster-General in revoking the second-class mail privilege which had been granted to the publisher of the *Milwaukee Leader*, some years before. That revocation was put upon the ground that as shown by the utterances of the paper during the six months after the United States had entered the war, the journal was seditious, violative of Section I of Title XII of the Act of June 15, 1917, known as "The Sedition Act"; that it had ceased to be "mailable matter" under the Congressional law providing for the classification of mails; and that the Postmaster-General's decision as to these points was conclusive, unless a wanton or very clear case of abuse of authority by him were shown.

The alleged objectionable matter printed in the newspaper published by the relator in this case is characterized by Mr. Justice Clark as "not designed to secure amendment or repeal of the laws denounced in them as arbitrary and oppressive, but to create hostility to, and to encourage violation of, them. * * * Without further discussion of the articles, we can not doubt that they conveyed to readers of them, false reports and false statements with intent to promote the success of the enemies of the United States, and that they constituted a willful attempt to cause disloyalty and refusal of duty in the military and naval forces and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law, and that therefore their publication brought the paper containing them within the express terms of Title XII of that law, declaring that such a publication shall

be 'non-mailable' and 'shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier.'"

The excerpts from the paper quoted by Mr. Justice Clarke seem to bear out all that he says of them and it can scarcely be doubted that they were seditious and that they did *tend* to obstruct the government in the prosecution of the war. The question remains, however, whether the Postmaster-General had authority to deal with the matter as he did. In his dissent, Mr. Justice Brandeis denies that Congress had conferred authority upon the Postmaster-General to revoke or suspend the second-class mail privilege in such case, and in this respect the dissent seems to be upon solid ground. There are at least three distinct questions in the case:

First.—Were the expressions in the *Milwaukee Leader,* referred to by the court, seditious or otherwise illegal?

Second.—If there were seditious expressions in the paper, could it be excluded altogether from the mails, *in futuro?*

Third.—Did the Postmaster-General have authority to revoke the second-class mailing privilege because of seditious or illegal utterances?

The majority of the court answer the first and third of these questions in the affirmative and so decide the case. Mr. Justice Brandeis answers the second and third in the negative, and discusses but does not finally answer the first, obviously because he does not think it necessary to a correct decision. If we concede that the utterances complained of were seditious, it by no means follows that the Postmaster-General had the right to take the action adopted in this case. No statute expressly gives him such authority. Congress has classified the mail into first, second, third and fourth classes, not with reference to the legal, ethical, or patriotic qualities of written or printed matter, but with reference to the size, periodicity and other external or mechanical attributes. There would seem no warrant whatever for the revocation of a granted privilege in one of these classes, for reasons which had nothing whatever to do with the classification. True, the permit issued recites "that the authority herein given is revocable upon determination by the department that the publication does not conform to law"; but a revocation limited only to one class of mail, to be valid ought to be based upon some violation of law touching the basis of the particular class of mail affected. A violation of law by a publisher, which goes to the fundamental character of the publication, may give ground for prosecution or for total exclusion from the mails; but to permit the Postmaster-General to have final determination in such decision and action as was involved in this case would open the door perhaps to all of the dangers pictured by Mr. Justice Brandeis in his vigorous opinion.

Upon the larger question as to whether the practical suppression of this paper involved an illegal abridgment of freedom of the press, it may well be doubted whether Mr. Justice Brandeis is upon sure ground. What would be permissible freedom of press and speech in peace time obviously would not necessarily be such during the emergency of a world war. Those who argue that constitutional guaranties, including the First Amendment, imply

the necessity of an unalterable attitude during all conditions, on the one hand, or as the only other alternative, the complete abandonment of such constitutional guaranties during time of war, show little knowledge of our constitutional law and its development during recent years at the hands, among others, of the two Justices, Brandeis and Holmes, dissenting in this case. See, for example, the opinions of Mr. Justice Holmes in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, and *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, especially pages 364-66. See also E. S. Corwin in 30 YALE L. JOUR. 48; Carroll, "Freedom of Speech and Press in the Federalist Period," 18 MICH. L. REV. 615; Wigmore, 14 ILL. L. REV. 539; Goodrich, 19 MICH. L. REV. 487; Chafee, 32 HARV. L. REV. 932. Upon the fundamental question here involved, this REVIEW plans to make a more comprehensive statement, in the near future. H. M. B.

WORKMEN'S COMPENSATION—COMPULSORY STATUTES AND DUE PROCESS.—Modern workmen's compensation acts are of European inception, the first of them having been enacted in Germany in 1884. This has been amended and extended from time to time until as late as 1911. The British Compensation Act was passed by Parliament in 1897. Its scope has been greatly extended by amendments in 1900 and 1906, and by supplemental legislation in 1912. At the present time compensation acts of one sort or another are in force in practically all the European countries. 1 BRADBURY'S WORKMAN'S COMPENSATION, (2nd ed.) 7; BOYD, WORKMEN'S COMPENSATION, § 8.

The movement for the enactment of such laws became widespread in the United States about the beginning of the present century, and bore first fruit in the federal act of 1908, the Montana act of 1909, and the first New York act of 1910. The succeeding ten years have witnessed a very extensive acceptance of the compensation idea, so that at present there are workmen's compensation acts of various sorts upon the statute books of more than thirty of our states.

While the American statutes present many types which differ more or less from one another yet all fall clearly into one or the other of two general classes: (1) optional statutes, in which the employer does not come under the act unless he so elects, but in which he is deprived of certain common law defenses in failure of such election; and (2) compulsory statutes. The great majority of the state statutes are of the optional or elective variety, and such laws have universally been upheld in the face of constitutional objections. L. R. A. 1916A, 414. Compulsory statutes, on the other hand, have been enacted in but five states,—New York (2 statutes), Washington, California, Montana and Ohio. It is with this type of law that the present note has to do, and more particularly with the constitutional objection urged against such acts that they effect a taking of property without due process of law.

The first of these statutes to receive judicial review was the New York act of 1910, (Laws of 1910, c. 674), which came before the Court of Appeals in the case of *Ives* v. *South Buffalo Ry. Co.* (1911), 201 N. Y. 271. The constitutionality of the act was attacked under both the State and Federal Con-